Supreme Court, U.S.
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No. 02-682

In The

Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE PROJECT TO PROMOTE COMPETITION AND INNOVATION IN THE DIGITAL AGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT TO THE LIMITED EXTENT OF CLARIFYING SHERMAN ACT SECTION 2 ANALYSIS

Of Counsel:
MITCHELL S. PETTIT
President
Project to Promote Competition and Innovation in the Digital Age
2001 K Street, Suite 800
Washington, D.C. 20006
(202) 912-7140

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5800
Counsel for the Project to Promote Competition and Innovation in the Digital Age

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THE INTEREST OF PROCOMP

The Project to Promote Competition and Innovation in the Digital Age ("ProComp") is a trade association founded in 1998 by high tech enterprises such as Sun Microsystems, Oracle, Netscape, and the Sabre Group to analyze competition and other policy issues relating to information technology. ProComp's membership consists of companies and trade associations with particular knowledge and expertise in software and other high technology markets. ProComp has no shareholders or other owners.[1]

ProComp had no special interest in this case when it was first heard in the District Court or in the Court of Appeals, but became interested after reading briefs explaining that the Department of Justice and Federal Trade Commission did not support the "balancing approach" expressed in the D.C. Court of Appeals' decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (*en banc*), *cert. denied*, 534 U.S. 952 (2001). ProComp supports the principles set forth in that decision and supports Respondent to the limited extent of clarifying Sherman Act Section 2 analysis. Some of ProComp's members have filed or may file lawsuits against Microsoft alleging Section 2 violations. We discuss in this brief both the essential facilities doctrine, and the effect of contract breaches in Section 2 cases, because of the interest of members in private litigation, not because either of these questions is presented in *Microsoft*.

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[1] Pursuant to Supreme Court Rule 37.6, ProComp states that no counsel for a party to this case authored this brief in whole or in part. No monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*. The only entity, other than *amicus curiae*, who assisted in the preparation of this brief is counsel to Sun Microsystems. In accordance with Supreme Court Rule 37.3(a), ProComp submits this brief pursuant to the blanket consents granted by Petitioner on May 15, 2003 and Respondent on May 19, 2003, which have been filed with the Court.

SUMMARY OF ARGUMENT

The federal agencies' position in this case with respect to balancing, harm to competition, and business justifications, may be inconsistent with the D.C. Circuit's *en banc* decision in the Justice Department's suit against Microsoft; if so, it is wrong. This is not the case for a broad rejection of the essential facilities doctrine. Moreover, a breach of contract may constitute exclusionary conduct supporting a Section 2 violation.

ARGUMENT

I. THE FEDERAL AGENCIES' POSITION IN THIS CASE MAY BE INCONSISTENT WITH THE D.C. CIRCUIT'S *EN BANC* DECISION IN THE JUSTICE DEPARTMENT SUIT AGAINST MICROSOFT; IF SO, IT IS WRONG.

We cannot discern why the Department of Justice thought it necessary to explain to this Court in its brief supporting the grant of the petition for certiorari that it did not support the approach for analyzing Section 2 cases articulated by the D.C. Circuit *en banc* in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied* 534 U.S. 952 (2001). In that brief, it states:

> In *United States v. Microsoft Corp.*, . . . the en banc District of Columbia Circuit suggested, as one step of its analysis under Section 2, a "balancing approach" analogous to the "rule of reason" standard applied under Section 1 of the Sherman Act. The United States did not suggest or endorse such a "balancing approach" in the *Microsoft* case.

(Cert. Brief at 11 n.2.)

In its *en banc* opinion in *Microsoft*, the D.C. Circuit articulated a four-part test to determine whether a monopolist's conduct is exclusionary. "First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.'" *Microsoft*, 253 F.3d at 58. Second, "the plaintiff must show that its injury is 'of the type that the statute was intended to forestall,' . . . that the monopolist's conduct

harmed competition, not just a competitor." *Id.* "Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the *monopolist may proffer* a 'procompetitive justification' for its conduct." *Id.* (citing *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 483 (1992)) (emphasis added). "Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.*

In the appeal of *Microsoft*, the Department took the position that the burden of demonstrating that the defendant's conduct made "economic sense" was on the defendant, and that the plaintiff need only prove "exclusionary or anticompetitive behavior" that "threatens to defeat or forestall the corrective forces of competition."[2] The Department correctly noted in its brief in *Microsoft*:

> [A]s the Supreme Court's decisions in *Eastman Kodak* and *Aspen* illustrate, there is nothing improper about requiring a monopolist to come forward with legitimate business justifications for conduct that appears to be anticompetitive."[3]

However, in their Merits Brief in this case, the federal agencies said, "[w]here, as here, the plaintiff asserts that the defendant was under a duty to assist a rival . . . conduct is not exclusionary or predatory *unless* [emphasis in original] it would make *no economic sense* [emphasis added] for the defendant but for its tendency to eliminate or lessen competition." (Merits Brief at 15.) Petitioner Verizon cites this portion of the federal agencies' brief and states, "Respondent's proposed expansion of Section 2 cannot be squared with a basic Section 2 principle – that unilateral conduct is lawful as long as it makes business sense apart

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[2] Department of Justice Appellate Brief at 48-49, *Microsoft* (relying on *Eastman Kodak*).

[3] *Id.* at 49-50.

from enabling monopoly returns." (Petitioner's Cert. Brief at 11.) The quoted language should not be read to suggest that the fourth part of the D.C. Circuit test is not necessary if defendant proffers a facially plausible justification.

Business efficiency is an affirmative defense and, in the right circumstances, can appropriately lead to a balancing of pro- and anticompetitive effects. Balancing is necessary where both efficiency and anticompetitive effect are present. Balancing has been raised only tangentially by the government and it would be premature to make a definitive ruling on the broad question of balancing without the issue being fully briefed and squarely before the Court. The District of Columbia Circuit's four-part test articulated in *Microsoft* is clearly a correct statement of the law.

II. THIS IS NOT THE CASE FOR A BROAD REJECTION OF THE ESSENTIAL FACILITIES DOCTRINE.

It is true that the essential facilities doctrine has not been explicitly recognized by the Court. The federal agencies and Petitioner Verizon come to the edge of inviting its general repudiation, but seem to step back. Wholesale repudiation of the doctrine would be unwise. Even the late Professor Areeda was unprepared to abandon the doctrine across the board when he proposed its limitation.[4] *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983), is rightly recognized both by Professor Areeda and the federal agencies' Merits Brief as having value because it does require evidence of exclusionary conduct.[5] The Telecommunications Act of 1996 imposes a greater statutory duty to deal with competitors on ILECs than would be imposed in an unregulated market. It would be unnecessary to decide here the abstract

[4] Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989).

[5] *Id.* 58 Antitrust L.J. 841, 845, 852; Merits Brief at 21-22.

question of whether an essential facility is ever appropriate as a basis of liability in a Section 2 case.

III. A BREACH OF CONTRACT MAY CONSTITUTE EXCLUSIONARY CONDUCT SUPPORTING A SECTION 2 VIOLATION.

The federal agencies characterize Respondent Trinko's claim in this case as a monopolist's "breach of an agreement to deal on particular terms." (Merits Brief at 20.) They suggest that the antitrust law generally should not "interfere" with such breaches – if the breach makes "business sense apart from exclusionary consequences." *Id.* We have no views about the special circumstances of the regulated telecommunications market. But here, too, the federal agencies may be straying beyond the context of this case – to affect unregulated markets. Exclusionary conduct that constitutes a breach of contract may violate Section 2, and indeed be at the very core of the antitrust violation. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), where the refusal to deal made some non-exclusionary economic sense (but not much) – the antitrust violation would have resulted from, and been no less, if Aspen Skiing had breached its contract with Aspen Highlands, rather than merely failing to renew it. *See also Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328-9 (1955), where the Court held that a course of exclusionary conduct that was the subject of a preexisting settlement agreement could create new liability if that course of conduct was repeated. There should be no implication that the antitrust laws are displaced simply because some anticompetitive conduct could also be styled as a breach of contract.

CONCLUSION

Monopolists who engage in exclusionary conduct which causes competitive harm that outweighs efficiency justifications should not be protected from judicial scrutiny of their compliance with Section 2 of the Sherman Act.

Respectfully submitted,

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5800
Counsel for the Project to Promote Competition and Innovation in the Digital Age

Of Counsel:
MITCHELL S. PETTIT
President
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